Supreme Court, U.S.
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No. 95-588

In the Supreme Court of the United States

October Term, 1995

REDLAND SOCCER CLUB, INC. et al.,

Petitioners

vs.

DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA
and
THE UNITED STATES OF AMERICA,

Respondents

REPLY BRIEF TO BRIEF IN OPPOSITION

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ARGUMENT

1. Despite Respondents' arguments to the contrary, the fact is that the Court of Appeals for the Third Circuit has held in this case that medical monitoring cannot be awarded unless it is shown that medical *tests* (not a special *regimen)* are necessary. The record shows that Petitioners' medical expert specifically recommended a special medical monitoring regimen, even though special tests were not recommended. Petitioners not only raised that point but supported it with citations to the record in their Petition for Rehearing to the Third Circuit, as follows:

> 10. The critical factual error is that Dr. Daum did, in fact, recommend a medical monitoring regimen that differed from the regimen normally recommended, even though she noted that the examinations she suggested are recommended for all adults, as this Court noted. *Slip Opinion* at 37-38.
>
> 11. Jessica Herzstein, M.D., M.P.H., Defendants' medical expert, gave testimony that not only shows that Dr. Daum had recommended a regimen different from the one normally recommended but also shows that Defendants had never raised that issue, since Dr. Herzstein criticized Dr. Daum for recommending tests that are not normally recommended by the American Cancer Society. 92a and *see* 79a-87a and 88a-95a.
>
> 12. Dr. Daum also recommended that specific medical tests be done commencing at an earlier age and occurring at a greater frequency than that recommended for the general population. 3012-3013a.

> 13. Thus, the fact that the examinations (*i.e.*, the precise medical tests) recommended by Dr. Daum did not differ from examinations recommended for the general population did not mean that the medical monitoring regimen recommended by Dr. Daum was not different.

See attached Supplemental Appendix (hereinafter "Pet. S. App.") at 4b. Any implication in Respondents' Brief in Opposition (hereinafter "Opp. Brief") that the record fails to show that a special monitoring regimen was not recommended is, therefore, clearly erroneous.[1]

As noted in the instant Petition, the Third Circuit repeatedly emphasized the *type* of testing that was recommended, not the regimen. *See* Pet. at 16, Pet. App. at 43a-44a and 58a, and 55 F.3d at 841 and 848. Thus, neither the precise nature of the Third Circuit's holding nor the importance of that holding has been brought into serious question by Respondents.

The importance to the federal government of the Third Circuit's requirement for special medical tests has not been challenged. Respondents have not and cannot genuinely dispute the enormity of the toxic waste problems facing the United States' military, nor can they dispute that the military services have been the greatest single source of the toxic waste problems confronting this Country. *See* Pet. at 11. Thus, Respondents do not argue that the question of what standards will be utilized by federal courts to determine when the military must pay for medical monitoring of individuals who

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[1] While Respondents' Brief never expressly asserts that the medical monitoring regimen recommended by Petitioners' expert was not special, it does assert that Petitioners failed to direct this Court's attention to a specific portion of the record. Opp. Brief at 12. Since there is no genuine dispute as to what the record shows, particularly in light of the fact that Respondents' own expert criticized Petitioners' expert for recommending a special regimen, such an assertion elides the question.

were exposed to toxic substances as a result of legally wrongful military action is unimportant to the federal government.[2] Rather, they argue only that that question is a matter of state law.

Even if the question of whether the Third Circuit erred in creating a standard requiring a need for special medical testing is viewed as one of state common law, this Court is not powerless to review a circuit court decision that erroneously predicts what a particular state's courts would do. That is particularly true where the court of appeals has created a new legal requirement that is not only wholly lacking in precedential support but is also fundamentally flawed.[3] It is even more true when such a flawed holding has resulted, at least in part, from the circuit court's failure to afford an opportunity to a party to address the question, an issue discussed below.

The fact that this Court must be selective in determining when to grant certiorari is indisputable. Nevertheless, even cases which at first sight might be viewed as raising questions that do not normally justify the allocation of this Court's time do occasionally raise issues that justify this Court's attention. In the instant case, the question of the standard applicable to medical monitoring may be extremely important to the federal government. Of greater importance in this case, perhaps, is a consideration of this Court's critical role in supervising lower courts. If opinions of courts of appeal are not reviewed any

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[2] It could be argued that the question involved is of such great importance to the federal government that this is an area involving "uniquely federal interests" which would justify the application of federal common law under the analysis of *Boyle v. United Technologies Corp.* 487 U.S. 500, 504-505 (1988). However, it is not necessary to reach that question in order to determine whether the instant Petition should be granted.

[3] Respondents have not even attempted to argue that the decision of the Utah Supreme Court in *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (1993) supports a holding requiring special medical tests. Rather, they suggest that the Third Circuit's holding merely requires a special regimen, even though that is clearly not the case, as discussed above.

time a case involves an issue of state common law—even when that issue is of importance to the federal government, when the appeals court has created an unprecedented and erroneous standard, and when the court has failed to afford the parties an opportunity to address the issue—the federal judicial system is harmed.

2. Respondents' attempt to suggest that Petitioners did have an opportunity to address the issue of whether they were required to and did show that they needed either special medical tests or a special regimen is completely predicated upon their assertion that the Third Circuit merely followed its earlier holding in *In Re Paoli Railroad Yard Litigation*, 35 F.3d 717 (1994) *(Paoli, II)*. *See* Opp. Brief at 6-10, and 12-14. That assertion is fallacious, however.

Paoli II did not hold that special medical *tests* must be recommended for medical monitoring to be awarded, which was the actual holding of the Third Circuit in this case. There is even some doubt that that decision should be viewed as clearly holding that a special regimen must be recommended. The language cited by Respondents as that holding constituted one-half page out of an eighty-two page opinion. 35 F.3d at 788. It is not clear that that language, which discusses the standard adopted by the Utah court in *Hansen, supra*, was analytically necessary to the Court's ultimate judgment reversing the summary judgment that had been entered by the district court. Furthermore, although the decision first suggests that a special monitoring regimen must be necessitated, it then notes that it need only be shown that the exposure to toxic substances was a significant contributing factor in creating a need for medical monitoring. *Id.* at 788 (n.53).

Thus, Respondents' suggestion that Petitioners should have requested an opportunity to be heard on the issue of the application of *Paoli II* after oral argument had been conducted

by the Third Circuit is illogical. Even if that opinion is viewed as unequivocally requiring that a special medical monitoring regimen is necessary, Petitioners would not have needed to address that issue, since the record clearly showed that a special regimen had been recommended. The heart of the *Paoli II* opinion, which consists of a discussion of the reliability and admissibility of expert testimony, only buttressed arguments that had already been advanced by Petitioners. Furthermore, Respondents' suggestion evades the true question.

The fact is that Petitioners were never afforded an opportunity to address the question of whether special medical tests or a special regimen was required. Respondents never raised the argument that Petitioners had failed to meet such a burden. In fact, the obverse is true; Respondents' expert attacked the opinion of Petitioners' expert precisely on the basis that the regimen recommended was different from the regimen usually recommended. Pet. S. App. at 3b-4b (¶11). Yet, as Respondents specifically note, the Third Circuit decided this case against Petitioners on the basis that they had not introduced evidence on an issue that had never been raised. Opp. Brief at 10-11 (n.6).

Petitioners specifically raised the argument that they had never been afforded an opportunity to address the issue in their Petition for Rehearing to the Third Circuit. Pet. S. App. at 2b-3b (¶¶1-8). Respondents did not then argue that the issue had been raised at any earlier point or that Petitioners had been afforded an actual opportunity to address it, and they have not argued that now. Petitioners' argument that legal issues can be decided on appeal in some instances without affording the parties an opportunity to address it is inapposite. The issue of whether the summary judgment entered against Petitioners should have been affirmed on the basis that they had failed to show that the needed special medical tests was not a purely legal one but involved questions of fact as well.

Argument

This Court's opinions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), efficaciously strengthened the procedural device of motions for summary judgment, thereby facilitating earlier and more efficient resolution of cases. However, when that procedural devise is utilized to resolve a case against a party on the basis of an issue that was never raised by the opposing party's motion and that the losing party was never otherwise given an opportunity to address, that device does not provide due process or fundamental fairness. It becomes an ambush.

3. Respondents' citation to precedential authority to support the proposition that a *Touhy* regulation may properly be utilized to prohibit governmental employees from disclosing official information or documents that have been acquired as a result of the performance of official duties is, once again, accurate but inapposite. It begs the question by assuming that the eyewitness testimony that had been sought by Petitioners from *former* employees constituted "official information." Respondents compound this error by also suggesting that Petitioners had failed to inform Respondents about the precise nature of the information sought. Opp. Brief at 15. To the contrary, Respondents only learned about the existence of those former employees as potential witnesses when Petitioners listed them and indicated that they would testify as to their "... eyewitness observations concerning the routine handling, usage, and disposal of toxic and/or hazardous substances at NCAD during the course of their employments—some eight to nine years earlier." Pet. at 8. In fact, the parties had corresponded in detail concerning this matter. *See* 79a.

The question posed by this issue is not an insignificant one. The courts below have now extended *Touhy* well beyond its literal language and beyond the intention of this Court. If *Touhy* regulations are to be automatically applied to all former government employees regardless of how remote in time their

employment was, if even eyewitness observations are automatically deemed to constitute "official information" and if those automatic conclusions are to be applied even in cases where the government is a party who has been specifically alleged to have engaged in tortious conduct, then *Touhy* invades rights guaranteed by the First and Fifth Amendments of the United States Constitution.[4] *See* Pet. at 26. That question should not be dismissed as insignificant, despite Respondents' assertions. Opp. Brief at 15.

[4] The fact that those assumptions have been automatically made is demonstrated by the fact that the district court ruled upon Petitioners' Motion raising this issue before Petitioners were even afforded an opportunity to submit a brief addressing it and by the fact that the Third Circuit summarily dealt with this issue without addressing any of the questions that had been raised. Pet. S. App. at 8b-9b (¶¶38-39).

CONCLUSION

For the foregoing reasons and the reasons set forth in the instant Petition, this Court should grant certiorari.

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Dated: January 11, 1996

Supplemental Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-7829

REDLAND SOCCER CLUB, INC., et al.,

Appellants

v.

DEPARTMENT OF THE ARMY OF UNITED STATES OF AMERICA, et al.,

Appellees

Appeal from the United States District Court for the
Middle District of Pennsylvania
M.D. No. 1:CV-90-1072
(The Honorable William W. Caldwell)

PETITION FOR REHEARING

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NOW COME Appellants/Plaintiffs (hereinafter "Plaintiffs") to petition this Honorable Court, pursuant to F.R.App.

40, for a rehearing of the above-captioned appeal and state the following in support thereof:

A. *The decision of May 15, 1995, is improperly and erroneously based upon an issue that was neither raised in the District Court nor raised on appeal.*

1. The precise basis of this court's decision affirming the summary judgment entered by the District Court as to all Plaintiffs other than the Elliotts was stated as follows:

> Thus, because all the Redland FTCA Plaintiffs (the Township Workers, the Neighbors and the Soccer Players) failed to introduce evidence that their exposure *required a different medical monitoring regimen than that which would normally be recommended for them absent exposure*, under *Paoli II*, we will affirm the District Court's Order granting summary judgment to the United States on the Redland FTCA Plaintiffs' medical monitoring claims. (emphasis added)

Slip Opinion of May 15, 1995 (hereinafter "Slip Opinion") at 38, a copy of which is attached hereto as Exhibit "A."

2. The issue of whether a necessary element of Plaintiffs' cause of action was to show that their exposure required a different medical monitoring regimen than that normally recommended and whether Plaintiffs had met that burden was never raised by Defendants in the District Court.

3. The District Court did not address the issue of whether Plaintiffs were required to and could show that they needed a different medical monitoring regimen.

4. That issue was not raised by Defendants in this Court, nor was that issue addressed in any of the briefs or raised during oral argument before this Court.

5. It would have been a clear error of law for the District Court to have entered summary judgment against Plaintiffs on

the basis of that aforesaid issue, since Defendants had not raised that issue and, therefore, Plaintiffs had not had an adequate opportunity to address it.

6. Since the issue of whether Plaintiffs had to and could show that they needed a different medical monitoring regimen is a mixed one of both law and fact, this Court erred as a matter of law in raising it *sua sponte* on appeal. *Fountain v. Filson*, 336 U.S. 681, 683, 69 S.Ct. 754, 755-56 (1949) and *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 156, 83 S.Ct. 1210, 1224, (1963).

7. The raising of that issue *sua sponte* after the filing of briefs and the holding of oral argument deprived Plaintiffs of due process by preventing them from being heard on that issue. *Paskaly v. Seale*, 506 F.2d 1209, 1211 (n.4) (9th Cir. 1974).

8. Plaintiffs should not now be required to show how they would have responded to that issue if it had been raised by the United States in the District Court, since Defendants' failure to raise that issue denied Plaintiffs an adequate opportunity to present relevant evidence (such as an Affidavit from Susan M. Daum, M.D.) addressing that issue.

9. Nevertheless, assuming, *arguendo*, that Plaintiffs are required to address that issue in the instant Petition or upon rehearing, Plaintiffs can show that the Court's resolution of that issue is based upon both legal and factual errors.

10. The critical factual error is that Dr. Daum did, in fact, recommend a medical monitoring regimen that differed from the regimen normally recommended, even though she noted that the examinations she suggested are recommended for all adults, as this Court noted. *Slip Opinion* at 37-38.

11. Jessica Herzstein, M.D., M.P.H., Defendants' medical expert, gave testimony that not only shows that Dr. Daum had recommended a regimen different from the one normally

recommended but also shows that Defendants had never raised that issue, since Dr. Herzstein criticized Dr. Daum for recommending tests that are not normally recommended by the American Cancer Society. 92a and *see* 79a-87a and 88a-95a.

12. Dr. Daum also recommended that specific medical tests be done commencing at an earlier age and occurring at a greater frequency than that recommended for the general population. 3012-3013a.

13. Thus, the fact that the examinations (*i.e.*, the precise medical tests) recommended by Dr. Daum did not differ from examinations recommended for the general population did not mean that the medical monitoring regimen recommended by Dr. Daum was not different.

14. If Plaintiffs had been given an opportunity to present evidence on this issue, they would have shown that medical monitoring can usually only consist of well-established, commonly-recommended medical tests or procedures. For example, in cases involving exposure to asbestos, the test generally recommended is a chest x-ray, since chest x-rays are the best and, perhaps, only appropriate test for determining the effects of exposure to asbestos; however, chest x-rays are routinely recommended for the general adult population. Did this Court really intend to hold that medical monitoring could only be ordered for a group that has been exposed to asbestos if a doctor can recommend some test other than a chest x-ray?

15. This Court erred in determining that *Paoli II* and *Hansen v. CCI Mechanical, Inc.*, 858 P.2d 970, 980 (Utah) (1993) held that a "significant exposure" can be shown only where an exposure is sufficient to require a monitoring regimen different from that normally recommended. *See Slip Opinion* at 33-34. In *Hansen, supra,* the court merely reasoned that a plaintiff's medical expert's failure to recommend testing

other than that recommended for the general population constituted evidence that that expert did not really view the exposure as being "significant." *Id.* at 980; *Paoli II* at 788.

16. The instant case would be distinguishable from *Hansen* on the basis that Dr. Daum expressly and unequivocally opined that the Plaintiffs had suffered a "significant exposure," as well as being distinguishable on the basis that Dr. Daum did, in fact, recommend a regimen of testing that is different from that recommended for the general population.

17. In light of the foregoing, the court clearly erred in affirming summary judgment against Plaintiffs on the basis that Plaintiffs had failed to prove that their exposure required a different medical monitoring regimen than that which would normally be recommended, and the instant Petition should, therefore, be granted.

B. *This Court erred in its decision of May 15, 1995, on other issues that were properly raised, briefed, and argued by Plaintiffs.*

18. This Court affirmed the District Court's entry of summary judgment against Plaintiffs' claim for damages for negligent infliction of emotional distress based upon the following finding:

> The record shows that none of the Redland FTCA Plaintiffs currently suffer ... a medically-identifiable effect from any exposure to chemicals at the Park.

Slip Opinion at 38.

19. That finding is factually erroneous, since Plaintiffs' experts unequivocally testified that Plaintiffs had been exposed to and ingested toxic substances and that that exposure resulted in a significant health risk (*i.e.*, a "medically-identifiable effect") to Plaintiffs.

20. If this Court intended to hold that a "physical injury or impact" sufficient to support a claim for emotional distress could not be established by showing an exposure to toxic substances which results in a significant health risk, then that holding constitutes an error of law because it is in conflict with this Court's prior holding in *Paoli I* and other relevant precedents.

21. This Court erred by holding—without any discussion or consideration of arguments properly raised and briefed by Plaintiffs and only in a footnote—the following:

> We believe that the elements of a claim for medical monitoring under CERCLA and HSCA are the same as the elements for a common law, medical monitoring claim set out in *Paoli I* and *Paoli II*.

Slip Opinion at 39 (n.12).

22. Plaintiffs had, in fact, presented a detailed analysis of the statutory provisions, history, and intent of both CERCLA and HSCA and had particularly focused upon the express provisions for medical monitoring and studies in HSCA. *See Brief for Appellants* at 15-21 and *Reply Brief for Appellants* at 10-16.

23. Both HSCA and CERCLA are strict liability statutes.

24. This Court erred as a matter of law in applying a common law tort standard to HSCA and CERCLA.

25. Particularly in light of HSCA's legislative intent and express provisions for medical monitoring and studies, this Court erred in applying a common law tort standard to it.

26. This Court held that the costs incurred by Plaintiffs for the performance of the health risk assessment and obtaining of expert testimony did not constitute recoverable "response costs" under CERCLA on the basis that those costs were "designed" to serve "litigation purposes." *Slip Opinion* at 32.

27. That holding constitutes error, since the intention of a party in incurring costs is altogether irrelevant to a consideration of whether a cost is a recoverable "response cost" under CERCLA; rather, this Court should have addressed the question (which was properly briefed and argued by Plaintiffs) of whether, in the event that Plaintiffs prevail in obtaining medical monitoring medical monitoring [sic] under CERCLA, they would be entitled to recover those costs in light of the fact that obtaining a health risk assessment and Dr. Daum's recommendations concerning a medical monitoring regimen would have been necessary and proper elements of that medical monitoring and, therefore, would be recoverable costs.

28. This court summarily, without discussion, and in a footnote rejected Plaintiffs' argument that the District Court had abused its discretion by denying Plaintiffs' Motion for Emergency Relief. *Slip Opinion* at 10-11 (n.2).

29. That summary rejection of Plaintiffs' argument constitutes error for reasons discussed below.

30. This Court summarily, without discussion, and in a footnote rejected Plaintiffs' argument that the District Court erred in failing to consider whether the United States' commission of illegal acts, status as a tort feasor, and failure to objectively evaluate the deliberative content of documents allegedly privileged should have been considered by the District Court. *Slip Opinion* at 53 (n.22).

31. This Court's summary rejection of those contentions without addressing the arguments briefed to this Court and the precedential authority cited to the District Court constitutes error. *See Brief for Appellants* at 29-33 and *Reply Brief of Appellants* at 19-23.

32. This Court summarily, without discussion, and in a footnote held that Plaintiffs' argument that the District Court

abused its discretion by denying class certification lacked merit. *Slip Opinion* at 10-11 (n.2).

33. That summary holding, which failed to address any of the authority or principles cited by Plaintiffs, constitutes error. *See Brief for Appellants* at 36-39 and *Reply Brief of Appellants* at 23.

C. *This Court's decision of May 15, 1995, erroneously and improperly fails to address issues which were properly raised and briefed by Plaintiffs.*

34. This Court expressly declined to address the issue of whether the Plaintiffs were entitled to injunctive and remedial relief, including attorneys' fees, expert fees, and health risk assessment costs, under HSCA in light of the Court's disposition of Plaintiffs' other claims. *Slip Opinion* at 42 (n.14).

35. In light of the fact that the Court's disposition of this appeal was erroneous for the reasons discussed above, the court's failure to address the issue of whether Plaintiffs are entitled to injunctive and remedial relief under HSCA is error.

36. This Court failed to address the issue, which was properly raised and briefed by Plaintiffs, of whether the District Court erred in denying Plaintiffs' Motion for Partial Summary Judgment, apparently in light of this Court's disposition of this appeal. *See Brief for Appellants* at 21-27 and *Reply Brief of Appellants* at 16-19.

37. In light of the fact that this Court's disposition of this appeal constitutes error for the reasons discussed above, the Court's failure to address the issue of whether the district court erred in failing to grant partial summary judgment to Plaintiffs also constitutes error.

38. As noted above, this Court summarily rejected Plaintiffs' argument that the District Court abused its discretion in denying Plaintiffs' Motion for Emergency Relief without ad-

dressing any of the arguments that had been raised and briefed by Plaintiffs.

39. Plaintiffs had raised and briefed the following arguments that the District Court abused its discretion in denying Plaintiffs' Motion for Emergency Relief:

> a. That eyewitness observations concerning the use, handling, and disposition of toxic and hazardous substances by Army employees eight or nine years earlier did not constitute "official information" under the Army's *Touhy* regulation;
>
> b. That a *Touhy* regulation cannot be invoked to preclude a private litigant from obtaining relevant and probative eyewitness testimony on an issue material to litigation in which the government has been accused of wrongful conduct;
>
> c. That the application of the Army's *Touhy* regulation in the context of this case violated Plaintiffs' First and Fifth Amendment rights; and
>
> d. That the Court below erred in failing to afford Plaintiffs an opportunity to brief or otherwise submit supporting argument for their Motion for Emergency Relief.

See Brief for Appellants at 27-29 and *Reply Brief of Appellants* at 19.

40. The Court's failure to address each of the arguments set forth above constitutes error.

41. This Court also rejected Plaintiffs' argument that the District Court abused its discretion in its Order of January 29, 1993, by denying Plaintiffs' Motion to Compel discovery of five documents on the basis that the District Court did not err in rejecting Plaintiffs' waiver argument. *Slip Opinion* at 53-54.

42. In addition to the waiver argument Plaintiffs properly raised and briefed the following arguments to support their assertion that the Order of January 29, 1993, constituted an abuse of discretion:

a. That the District Court not only held that the five documents were privileged but also improperly and erroneously suppressed all factual information contained in those documents;

b. That the District Court improperly applied a "compelling reasons" standard, rather than a balancing test in determining whether the five documents were privileged;

c. That, in light of the probative importance of those five documents, proper application of a balancing test mandates that those five documents not be deemed privileged for purposes of this litigation; and

d. That those five documents were not, in fact, subject to the Deliberative Process Privilege.

See Brief for Appellants at 29a-33a and *Reply Brief of Appellants* at 19a-23a.

WHEREFORE, Appellants (Plaintiffs below) respectfully request that this Honorable Court grant them a rehearing of this appeal, pursuant to Fed.R.App. 40.

Respectfully submitted,
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Dated: June 6, 1995

CERTIFICATE OF SERVICE

I, Laurence W. Dague, Esquire, of the law firm of Shumaker Williams, P.C., hereby certify that I served a true and correct copy of the foregoing Petition for Rehearing on this date by depositing a copy of the same in the possession of the United States mail, first-class, postage prepaid, addressed as follows:

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PROOF OF SERVICE

I, Laurence W. Dague, Esquire, of the law firm of Shumaker Williams, P.C., hereby certify that on this date a true and correct copy of the foregoing Petitioners' Reply Brief was served on the following persons:

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Dated: January 11, 1996